COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF ALLAN v. THE UNITED KINGDOM

(Application no. 48539/99)

JUDGMENT

STRASBOURG

5 November 2002

FINAL

05/02/2003

In the case of Allan v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Mr M. PELLONPÄÄ, *President*,
Sir Nicolas BRATZA,
Mr A. PASTOR RIDRUEJO,
Mrs E. PALM,
Mr M. FISCHBACH,
Mr J. CASADEVALL,
Mr S. PAVLOVSCHI, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 18 June and 8 October 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48539/99) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Richard Roy Allan ("the applicant"), on 20 January 1999.

2. The applicant, who had been granted legal aid, was represented before the Court by Mr R. Turnberg, a lawyer practising in Manchester. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office.

3. The applicant complained of the use of covert audio and video surveillance within his cell, the prison visiting area and upon a fellow prisoner and of the use of materials gained by these means at his trial for murder. He relied on Articles 6, 8 and 13 of the Convention.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 28 August 2001, the Chamber declared the application partly admissible.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The Chamber decided, after consulting the parties, that

no hearing on the merits was required (Rule 59 § 2 *in fine*). The parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. On 3 February 1995 Mr David Beesley, store manager, was shot dead in the manager's office of a Kwik-Save supermarket in Greater Manchester.

9. On 18 February 1995 the applicant and another man, by the name of Leroy Grant, were arrested on suspicion of having committed a robbery at the Late Saver shop, Cheadle. At the time, they were in possession of an 8-mm Beretta replica handgun. Charged in connection with this offence, Mr Grant admitted to the offence and several other late-night shop robberies. The applicant denied involvement in any of the offences. On or about 20 February 1995 an anonymous informant told the police that the applicant had been involved in the murder of David Beesley.

10. On 20 February 1995 the applicant and Leroy Grant appeared in custody at the Stockport Magistrates' Court and were further remanded in custody to reappear on 23 February 1995. On 20 February 1995 Detective Chief Inspector Dunn requested permission for the cell and the visiting areas used by the applicant and Leroy Grant to be bugged with audio and video technology, alleging that all regular methods of investigation to identify David Beesley's murderer had failed. The Chief Constable of the Greater Manchester Police granted authority on the same day for an unlimited period for both the police stations at Stockport and Cheadle Hulme. On 13 March 1995 similar authority was sought and obtained for the installation of a listening device with video system to be placed in the visiting area of Stretford police station, where the applicant was then held.

11. On 8 March 1995 the applicant was arrested for the murder and questioned. In the interviews with the police which followed, the police told the applicant that he was not obliged to say anything. He availed himself of that right.

12. During this time visits to the applicant by his female friend, J.N.S, were recorded on audio and videotape in the prison visiting area between 12 and 28 March 1995. The applicant and Leroy Grant were held for long periods in the same cell and recordings of their conversations were made from 20 February to 12 March 1995.

13. On 23 March 1995 H. was brought to Stretford police station. H. was a long-standing police informant with a criminal record who had been arrested on 21 March 1995 for unrelated offences. He was placed in the

applicant's cell for the purpose of eliciting information from the applicant. As asserted by the applicant, H. had every incentive to inform on him. Telephone conversations between H. and the police included comments by the police instructing H. to "push him for what you can" and disclosed evidence of concerted police coaching. After 20 April 1995 he associated regularly with the applicant who was remanded at Strangeways Prison.

14. On 28 June 1995 the applicant was taken away from the prison to be interviewed by the police concerning the Kwik-Save robbery. He was attended and advised by his solicitor. During the course of the interview, the applicant was invited to comment on the recordings made in February and March 1995. He made no comment to any question. According to the applicant, he was interrogated at length by the police in an attempt to "rattle" or unsettle him, such that he would be more talkative and vulnerable to H. upon his return to the prison. H. had been fitted with recording devices. The recording thereby obtained was adduced in evidence at the applicant's trial.

15. The applicant was interviewed again in the presence of his solicitor on 29 June and 26 July 1995 and remained silent when faced with the allegations.

16. On 25 July 1995 H. made a 59- to 60-page witness statement detailing his conversations with the applicant and was released on bail on 4 August 1995. His sentence was postponed until after he had given evidence at the applicant's trial. The high point of H.'s evidence was the assertion that the applicant had admitted his presence at the murder scene. This asserted admission was not part of the recorded interview and was disputed. The thrust of the applicant's case was that he was discussing robberies and did not accede to H.'s efforts to channel their conversation into a discussion of the murder. The audio- and video-recordings (or transcripts thereof) were utilised in the trial of the applicant. No evidence, other than the alleged admissions, connected the applicant with the killing of Mr Beesley.

17. In January 1998 the applicant's trial on one count of murder and a count of conspiracy to rob began before a jury. He was represented by leading counsel.

18. During his trial, the applicant's counsel challenged the admissibility of extracts from covert audio- and video-recordings of conversations of the applicant with Leroy Grant and J.N.S., under sections 76 and 78 of the Police and Criminal Evidence Act 1984 (PACE). The judge concluded that there was evidence on the tapes from which the jury could infer that the applicant was involved in the events of 3 February 1995, and it was not so unreliable that it could not be left to the jury to assess for themselves. The judge also rejected the applicant's counsel's arguments under sections 76 and 78 of PACE that the evidence from H. was obtained by oppression or by such impropriety as to render it inadmissible. He considered that the use

of an informant to talk and listen to the accused over a substantial period of time did not result in any unfairness to the accused. The fact that H. might be considered as having much to gain in giving evidence was also a matter to be left to the jury in their assessment of the reliability of his evidence. The evidence was accordingly admitted before the jury. The judge's ruling on the admissibility of the evidence was given on 26 January 1998, after a *voir dire* (submissions on a point of law in the absence of a jury) and consisted of a judgment of eighteen pages.

19. In his summing-up to the jury on 10 and 11 February 1998, the trial judge gave directions on the way in which the jury should assess the reliability of the disputed evidence. He told them that they were to judge whether the police had deliberately wound up the applicant during the interview on 28 June 1995 and how to approach the evidence put forward by H.:

> "So at the end of the day with regard to H. you have his evidence about the conversations that he had with [the applicant] and what [the applicant] said. You have the tape recordings of the conversations on 28 June when H. had been wired up, between [the applicant] and H., and you have the transcripts of the conversations between H. and the police. I suggest ... that you approach the evidence of H. with the very greatest caution and care. He is a professional criminal. He behaved, and has behaved as he acknowledged, dishonestly and criminally for years. He saw the likelihood of advantage to himself, both in terms of bail and in the sentence that he was likely to receive. You have heard that he has not yet been sentenced on matters for which he was in custody in early 1995. The defence say if you consider the whole picture you simply cannot rely upon H.; quite unsafe to do so. The prosecution say the contents of the tapes of 28 June can be relied on and are consistent with what H. says [the applicant] had said to him previously, before he, H., was wired up. Of course tapes of ... conversations cannot possibly constitute any independent confirmation of what H. says about what [the applicant] had said to him previously, because, and you will understand the logic of that, the information is all coming from one source, namely H. and the witness cannot strengthen his own evidence essentially by repetition.
>
> So, ladies and gentlemen, at the end of the day how do you regard H.? Was he or may he have been lying, or are you sure that he was telling the truth? If you are sure, for example, in relation to things said on the tapes of 28 June or other aspects of H.'s evidence that his evidence is true, that [the applicant] did say a number of things, what do those things mean? Do they point to his guilt, to his presence at Kwik-Save on 3 February 1995, or are they capable of meaning something else? ..."

20. The judge also directed the jury concerning the possible drawing of inferences from the applicant's silence in police interview on 28 and 29 June and 26 July 1995, pursuant to section 34 of the Criminal Justice and Public Order Act 1994. He reminded the jury that the defence had contended that the applicant's silence had been adopted on legal advice because of the view that oppressive interrogation techniques were being used.

21. On 17 February 1998, after the jury had deliberated for a total of twenty-one and a half hours, the applicant was convicted of murder before

the Crown Court at Manchester by a majority of ten to two and sentenced to life imprisonment. The applicant thereafter lodged a notice of appeal, asserting, *inter alia*, that the judge ought to have excluded evidence of the audio- and video-recordings of his conversations with Leroy Grant and J.N.S. and the evidence put forward by H. He also argued that the judge had erred in his directions as to the circumstances in which the jury could draw inferences from the applicant's failure to respond to police questions in interviews of 28 and 29 June, when the police strategy was to "spook" the applicant into a state of garrulousness when he returned to prison, where he had a conversation with H.

22. On 31 July 1998 he was refused leave to appeal against his conviction by a single judge. His renewed application was refused by the Court of Appeal (Criminal Division) on 18 January 1999, after a hearing at which he was represented by leading counsel. In the court's judgment of that date, Lord Justice Rose found that the trial judge gave a very careful and impeccable ruling as regards the admissibility of the tapes and evidence put forward by H. and that he had considered all the matters which he should have considered and had not considered any matter which he ought not to have considered. There was no basis for holding that the exercise of his discretion had been so flawed that the Court of Appeal should intervene. In so far as the applicant complained that the judge should have warned the jury not to take into account the applicant's failure to answer police questioning in the light of the police strategy to "spook" him, Lord Justice Rose found that the judge had given an entirely appropriate direction to the jury in the circumstances of the case.

II. RELEVANT DOMESTIC LAW

The Home Office Guidelines

23. Guidelines on the use of equipment in police surveillance operations (The Home Office Guidelines of 1984) provide that only chief constables or assistant chief constables are entitled to give authority for the use of such devices. The Guidelines are available in the library of the House of Commons and are disclosed by the Home Office on application. They provide, *inter alia*:

> "4. In each case, the authorising officer should satisfy himself that the following criteria are met:
>
> the investigation concerns serious crime;
>
> normal methods of investigation must have been tried and failed, or must from the nature of things, be unlikely to succeed if tried;

there must be good reason to think that use of the equipment would be likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism;

use of equipment must be operationally feasible.

5. In judging how far the seriousness of the crime under investigation justifies the use of a particular surveillance technique, authorising officers should satisfy themselves that the degree of intrusion into the privacy of those affected is commensurate with the seriousness of the offence."

24. The Guidelines also state that there may be circumstances in which material so obtained could appropriately be used in evidence at subsequent court proceedings.

The Police Act 1997

25. The 1997 Act provides a statutory basis for the authorisation of police surveillance operations involving interference with property or wireless telegraphy. The relevant sections relating to the authorisation of surveillance operations, including the procedures to be adopted in the authorisation process, came into force on 22 February 1998.

26. Since 25 September 2000 these controls have been augmented by Part II of the Regulation of Investigatory Powers Act 2000 (RIPA). In particular, covert surveillance in a police cell is now governed by sections 26(3) and 48(1) of RIPA. RIPA also establishes a statutory Investigatory Powers Tribunal to deal with complaints about intrusive surveillance and the use of informants by the police.

The Police and Criminal Evidence Act 1984

27. Section 76 provides:

"(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession that might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it might be true, was not obtained as aforesaid."

28. Section 78(1) provides:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

III. CASE-LAW FROM OTHER JURISDICTIONS

29. The parties have referred to cases concerning the use of informers to obtain incriminating statements from persons in police custody.

A. Canadian cases

30. In *R. v. Hebert* ([1990] 2 Supreme Court Reports 151), the accused had relied on his right to silence when questioned by the police. He had then been placed in a cell with an undercover police officer to whom he made statements implicating himself in a robbery. The Supreme Court held that the statements of the undercover officer should have been excluded at trial. McLachlin J said, *inter alia*:

> "The common-law rules related to the right to silence suggest that the scope of the right in the pre-trial period must be based on the fundamental concept of the suspect's right to choose whether to speak to the authorities or remain silent ...
>
> When the police use subterfuge to interrogate an accused after he had advised them that he does not wish to speak to them, they are improperly eliciting information that they were unable to obtain by respecting the suspect's constitutional right to silence: the suspect's rights are breached because he has been deprived of his choice. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right to choose whether or not to speak to the police. If the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police."

31. In *R. v. Broyles* ([1991] 3 Supreme Court Reports 595), B. was arrested and held for questioning in respect of a suspicious death. He had spoken to a lawyer who had advised him to remain silent. The police arranged for a friend to visit B. in custody while carrying a body-pack recording device. The friend questioned B. about his involvement in the murder and in the words of the Supreme Court "sought to exploit the [accused's] trust in him as a friend to undermine the [accused's] confidence in his lawyer's advice to remain silent and to create a mental state in which the [accused] was more likely to talk". The Supreme Court held that it was wrong to admit the evidence obtained by the friend that the accused knew the time of the deceased's death. According to the headnote of the reported case:

> "The right to silence is triggered when the accused is subjected to the coercive powers of the State through his or her detention. The right protects against the use of State power to subvert the right of an accused to choose whether or not to speak to the authorities. Where the informer who allegedly acted to subvert the right to silence of the accused is not obviously a State agent, the analysis must focus on both the relationship between the informer and the State and the relationship between the informer and the accused. The right to silence will only be infringed where the informer was acting as an agent of the State at the time the accused made the statement and where it was the informer who caused the accused to make the statement. Accordingly two distinct inquiries are required. First ... was the evidence obtained by an agent of the State? Second, was the evidence elicited? The right to silence ... will be violated only if both questions are answered in the affirmative.
>
> Applying the above principles to the facts of this case, it is clear that the informer was an agent of the State for the purposes of the right to silence in section 7 [of the Canadian Charter of Rights and Freedoms]. The conversation here would not have occurred or would have been materially different but for the authorities' intervention. Furthermore, the impugned statement was elicited. Parts of the conversation were functionally the equivalent of an interrogation and the appellant's trust in the informer as a friend was used to undermine the appellant's confidence in his lawyer's advice to remain silent and to create a mental state in which the appellant was more likely to talk."

32. In *R. v. Liew* ([1999] 3 Supreme Court Reports 227), the accused was arrested in connection with a cocaine deal and the police also pretended to arrest the undercover officer who negotiated the transaction. They were placed together in an interview room where the accused initiated a conversation referring to the arrest. The undercover officer asked the accused: "What happened?", and stated: "Yeah. They got my fingerprints on the dope." The accused replied: "Lee and me too." The Supreme Court found nothing to suggest that the exchange was the functional equivalent of an interrogation. It was of no consequence that the police officer was engaged in a subterfuge, permitted himself to be misidentified or lied, so long as the responses were not actively elicited or the result of interrogation. In this case the conversation had been initiated by the accused and the police officer picked up the flow and content of the conversation without directing or redirecting it in a sensitive area. Nor was there any relationship of trust between the accused and the officer or any appearance that the accused was obligated or vulnerable to the officer.

B. Australian cases

33. In *R. v. Swaffield and Pavic* ([1998] High Court of Australia 1), the accused Swaffield was one of the targets of an undercover operation aimed at identifying drug suppliers and also suspected of arson. An undercover officer held a conversation with the accused pretending that his own brother-in-law was suspected of arson and the accused made admissions of his own involvement in a fire. The High Court of Australia found that the

admissions should not have been admitted at trial as they had been elicited by a police officer in clear breach of the accused's right to choose whether or not to speak. The accused Pavic had been questioned by the police about a disappeared person and remained silent. After his release from custody, Pavic made incriminatory statements to a friend called C., who had been fitted with a listening device by the police. The High Court found that there was no impropriety involved and the admissions were reliable and should be admitted. C. had not been a police officer or a person in authority over Pavic. The fact that C. was regarded as trustworthy by Pavic was an indicator of the reliability of the admissions; a serious crime had been committed and there was no public interest to be served by rejecting the admissions. Kirby J stated:

> "Subterfuge, ruses and tricks may be lawfully employed by the police, acting in the public interest. ... The critical question is not whether the accused has been tricked and secretly recorded. It is not even whether the trick has resulted in self-incrimination, electronically preserved to do great damage to the accused at trial. It is whether the trick may be thought to involve such unfairness to the accused or otherwise to be so contrary to public policy that a court should exercise its discretion to exclude the evidence notwithstanding its high probative value. In the case of covertly obtained confessions, the line of forbidden conduct will be crossed if the confession may be said to have been elicited by police (or by a person acting as an agent of the police) in unfair derogation of the suspect's right to exercise a free choice to speak or to be silent."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION

34. The applicant relied on Article 8 of the Convention in respect of the use of covert video- and audio-recording devices in his cell and prison visiting area and on the person of a fellow prisoner. The relevant parts of Article 8 provide:

> "1. Everyone has the right to respect for his private ... life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

35. The Government accepted, following the judgment in *Khan v. the United Kingdom* (no. 35394/97, §§ 26-28, ECHR 2000-V) that the use of the audio- and video-recording devices in the applicant's cell, the prison

visiting area and on a fellow prisoner amounted to an interference with the applicant's right to private life under Article 8 § 1 of the Convention and that the measures were not used “in accordance with the law” within the meaning of Article 8 § 2 of the Convention.

36. The Court recalls, as in *Khan*, cited above, that at the relevant time there existed no statutory system to regulate the use of covert recording devices by the police. The interferences disclosed by the measures implemented in respect of the applicant were therefore not “in accordance with the law” as required by the second paragraph of Article 8 and there have thus been violations of this provision.

II. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

37. The applicant complained of the use at his trial of evidence gathered by the covert recording devices and of the admission of evidence from the prisoner H. concerning conversations which they had together in their cell. He relied on Article 6 of the Convention, which provides as relevant in its first sentence:

> “In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

A. The parties' submissions

1. The applicant

38. As regards the use of the evidence from the surveillance at trial, the applicant submitted that the remarks recorded on tape were not an accurate reflection of the Kwik-Save murder, referring to discrepancies with regard to what in fact happened. The time over which the recordings were made, namely, weeks, was oppressive. As he was aware of the possible recording, he was in a no-win situation because if he whispered or gestured, that was said to be incriminating, and if his remarks were not incriminating, he was said to be tailoring his remarks for the microphone. The tapes were also used in the police interviews to unsettle the applicant and set him up for adverse inferences in the event that he exercised his right to silence. This case was also different from that in *Khan* (cited above) relied on by the Government as the recording in this case was much more invasive and protracted and the evidence obtained filled with inaccuracies and unreliable.

39. The police used H. not as an inanimate listening post but as a means of conducting surreptitious interrogation, circumventing the protections for a suspect who has availed himself of legal advice and exercised the right to silence (referring to the Canadian authorities' finding that this constituted a

violation of the right to silence, *Hebert* and *Broyles*, both cited above). In particular, on 28 June 1995 the applicant was removed from prison to a police station and interrogated for a day as a "softening-up" process prior to his being questioned by H. The applicant's conviction was based substantially, if not decisively, on the evidence put forward by H. who was a persistent criminal under threat of sentencing which would depend on his role in the applicant's trial. The one and only alleged admission by the applicant of presence at the scene of the murder was not recorded but rested solely on the H.'s word. This was in all circumstances unfair and oppressive. The applicant further disputed that he suspected H.'s role in this connection or could in any way be regarded as waiving his right to complain about it.

2. The Government

40. The Government submitted, relying on *Khan*, cited above, that the admission at trial of recorded evidence obtained secretly by the police under the Guidelines did not violate Article 6. The surveillance had been lawful in domestic terms, there was no reason to suppose that the tapes were not an accurate reflection of what was said, they had not been obtained under any form of pressure and the applicant had an opportunity under domestic law to challenge their use. Furthermore, the tapes were not the only evidence against the applicant and the jury were made fully aware of any possible deficiencies in this evidence. There was no basis on which to distinguish this case from *Khan*, as in that case no violation was found despite the fact that the recording involved trespass and the evidence obtained was the only evidence against the applicant, whereas in this case the surveillance was lawful under domestic law and the recordings were not the only evidence against the applicant, as there was also the evidence put forward by H. They argued that in serious cases such as murder there was a particularly strong public interest in admitting such material, provided that, as here, the applicant had an opportunity to challenge its use.

41. Concerning H.'s testimony, the Government pointed out that questions of admissibility of evidence are for domestic courts. Issues of H.'s credibility and reliability were fully argued and explained to the jury which was in a good position to determine whether any findings of fact could be drawn from his statements. The applicant's counsel had been able to cross-examine H. Furthermore, the applicant had spoken voluntarily to H., knowing or at least suspecting that his conversations were being recorded and therefore must be taken as waiving his right to complain about it. There was accordingly no unfairness contrary to Article 6 § 1 in the use of this evidence at trial. Finally, the Government disputed the relevance of the Canadian cases cited by the applicant, noting that the *Hebert* case concerned the use of evidence actively elicited by an undercover agent (not covert audio- or video-recordings) and which was the only evidence against the accused, while in *Broyles* the information given by the accused to his visitor

was obtained in the functional equivalent of an interrogation and the accused's special trust in his friend exploited.

B. The Court's assessment

1. General principles

42. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46, and, for a more recent example in a different context, *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, *Reports of Judgments and Decision* 1998-IV, p. 1462, § 34). It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where a violation of another Convention right is concerned, the nature of the violation found.

43. In that context, regard must also be had to whether the rights of the defence have been respected, in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use, as well as the opportunity of examining any relevant witnesses; whether the admissions made by the applicant during the conversations were made voluntarily, there being no entrapment and the applicant being under no inducement to make such admissions (see *Khan*, cited above, § 36); and the quality of the evidence, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy (ibid., § 37). While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (ibid.).

44. As regards the privilege against self-incrimination or the right to silence, the Court has reiterated that these are generally recognised international standards which lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper

compulsion by the authorities and thus to avoid miscarriages of justice and secure the aims of Article 6 (see *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports* 1996-I, p. 49, § 45). The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seeks to prove the case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Saunders v. the United Kingdom*, judgment of 17 December 1996, *Reports* 1996-VI, p. 2064, §§ 68-69). In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will examine the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (see, for example, *Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 54-55, ECHR 2000-XII, and *J.B. v. Switzerland*, no. 31827/96, ECHR 2001-III).

2. Application in the present case

45. The Court notes that the recordings made of the applicant in the police station and prison when he was with Leroy Grant, J.N.S. and H. and the testimony of H. who had been placed in the applicant's cell by the police to obtain evidence against him constituted the principal evidence relied on by the prosecution at his trial.

46. The Court observes, firstly, that as in *Khan* the material obtained by audio- and video-recordings was not unlawful in the sense of being contrary to domestic criminal law. Similarly, there is no suggestion that any admissions made by the applicant during the conversations taped with Leroy Grant and J.N.S. were not voluntary in the sense that the applicant was coerced into making them or that there was any entrapment or inducement. Indeed, the applicant has stated that he was aware that he was possibly being taped while in the police station.

47. The applicant has argued that the evidence from the recordings was unreliable and contained many inconsistencies, while the Government have pointed to the admissions that it contained which were probative of the applicant's knowledge of the incident. As the applicant alleged that he knew of the possible recording and as the tapes indicated that a certain amount of whispering or gesturing was being carried out at times, the Court considers that an assessment of the strength or the reliability of the evidence concerned is not a straightforward matter. The applicant's conduct as a whole must have played a role in the assessment of the evidence and this Court is not well-placed to express a view. In those circumstances, the existence of fair procedures to examine the admissibility and test the reliability of the evidence takes on an even greater importance.

48. In that regard, the Court notes that the applicant's counsel challenged the admissibility of the recordings in a *voir dire*, and was able to put

forward arguments to exclude the evidence as unreliable, unfair or obtained in an oppressive manner. The judge, in a careful ruling however, admitted the evidence, finding that it was of probative value and had not been shown to be so unreliable that it could not be left to the jury to decide for themselves. This decision was reviewed on appeal by the Court of Appeal which found that the judge had taken into account all the relevant factors and that his ruling could not be faulted. At each step of the procedure, the applicant had therefore been given an opportunity to challenge the reliability and significance of the recording evidence. The Court is not persuaded that the use of the taped material concerning Leroy Grant and J.N.S. at the applicant's trial conflicted with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.

49. The applicant's second ground of objection, concerning the way in which the informer H. was used by the police to obtain evidence, including taped conversations with the applicant, a written statement and oral testimony about other allegedly incriminating conversations, raises more complex issues.

50. While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right, which the Court has previously observed is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.

51. Whether the right to silence is undermined to such an extent as to give rise to a violation of Article 6 of the Convention depends on all the circumstances of the individual case. In this regard, however, some guidance may be found in the decisions of the Supreme Court of Canada, referred to in paragraphs 30-32 above, in which the right to silence, in circumstances which bore some similarity to those in the present case, was examined in the context of section 7 of the Canadian Charter of Rights and Freedoms. There, the Canadian Supreme Court expressed the view that, where the informer who allegedly acted to subvert the right to silence of the accused was not obviously a State agent, the analysis should focus on both the relationship between the informer and the State and the relationship between the informer and the accused: the right to silence would only be

infringed where the informer was acting as an agent of the State at the time the accused made the statement and where it was the informer who caused the accused to make the statement. Whether an informer was to be regarded as a State agent depended on whether the exchange between the accused and the informer would have taken place, and in the form and manner in which it did, but for the intervention of the authorities. Whether the evidence in question was to be regarded as having been elicited by the informer depended on whether the conversation between him and the accused was the functional equivalent of an interrogation, as well as on the nature of the relationship between the informer and the accused.

52. In the present case, the Court notes that in his interviews with the police following his arrest the applicant had, on the advice of his solicitor, consistently availed himself of his right to silence. H., who was a long-standing police informer, was placed in the applicant's cell in Stretford police station and later at the same prison for the specific purpose of eliciting from the applicant information implicating him in the offences of which he was suspected. The evidence adduced at the applicant's trial showed that the police had coached H. and instructed him to "push him for what you can". In contrast to the position in *Khan*, the admissions allegedly made by the applicant to H., and which formed the main or decisive evidence against him at trial, were not spontaneous and unprompted statements volunteered by the applicant, but were induced by the persistent questioning of H., who, at the instance of the police, channelled their conversations into discussions of the murder in circumstances which can be regarded as the functional equivalent of interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution. While it is true that there was no special relationship between the applicant and H. and that no factors of direct coercion have been identified, the Court considers that the applicant would have been subjected to psychological pressures which impinged on the "voluntariness" of the disclosures allegedly made by the applicant to H.: he was a suspect in a murder case, in detention and under direct pressure from the police in interrogations about the murder, and would have been susceptible to persuasion to take H., with whom he shared a cell for some weeks, into his confidence. In those circumstances, the information gained by the use of H. in this way may be regarded as having been obtained in defiance of the will of the applicant and its use at trial impinged on the applicant's right to silence and privilege against self-incrimination.

53. Accordingly, in this respect there has been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

54. The applicant complained that he did not have an effective remedy concerning the surveillance measures implemented against him, relying on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

55. The Government accepting that the applicant did not enjoy an effective remedy in domestic law at the relevant time in respect of the violations of his right to private life under Article 8, the Court finds that there has been a violation of Article 13 of the Convention in this regard.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

57. The applicant claimed a reasonable sum for the violations of his right to privacy, referring to the fact that the recording in his cell lasted for five weeks, that the visits from his girlfriend were recorded on audio and videotapes and that his conversations with H. were recorded after a full day's interrogation by the police who intended to "spook" him. He also claimed compensation for non-pecuniary damage in respect of the violation of his right to a fair trial on the basis that the main corpus of the evidence against him resulted from violations.

58. The Government submitted that it was only in exceptional cases that a breach of Article 6 would require an award of just satisfaction, the Court refraining from speculation as to the outcome of the proceedings. They pointed out that any trial would have caused the applicant anxiety and stress and that he had in any event been aware of the recording and there was no element of pressure or exploitation. No award was appropriate in their view.

59. The Court observes that the applicant's right to respect for his private life was violated in several respects and that he had no effective remedy under domestic law. It considers that the applicant must thereby have suffered some feelings of frustration and invasion of privacy which is not sufficiently compensated by a finding of violation. As regards the finding of a violation of Article 6 § 1 of the Convention in regard to the use of the informer H. and his evidence at trial, it finds it inappropriate to speculate as

to the outcome of the trial in other circumstances and considers that a finding of a violation constitutes just satisfaction in that respect.

60. The Court awards the applicant 1,642 euros (EUR) for non-pecuniary damage.

B. Costs and expenses

61. The applicant claimed a total of 11,822.89 pounds sterling (GBP) for legal costs and expenses, including GBP 5,875 for counsel's fees (inclusive of value-added tax (VAT)) and GBP 5,947.89 for solicitors' fees and expenses.

62. The Government considered that this was a large sum for a case examined on written submissions and that the fee rate of GBP 180 per hour for the applicant's solicitors was high and was charged at full rate, rather than half rate for travelling and waiting time. They also found the claims of counsel for up to twenty-five hours' work on one set of observations and six hours for another set to be overstated. They proposed that a reasonable figure would be GBP 7,500 inclusive of VAT.

63. The Court considers that the sums claimed are on the high side for a case in which no oral hearing was held. It awards the sum of EUR 12,800, plus any VAT which may be chargeable.

C. Default interest

64. The applicable interest rate is the marginal lending rate of the European Central Bank plus three percentage points (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 124, ECHR 2002-VI).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there have been violations of Article 8 of the Convention in respect of the use of covert recording devices;

2. *Holds* that there has been a violation of Article 6 of the Convention in respect of the admission at the applicant's trial of evidence obtained by use of the informer H.;

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to

Article 44 § 2 of the Convention, the following amounts to be converted into pounds sterling at the rate applicable at the date of settlement:

(i) EUR 1,642 (one thousand six hundred and forty-two euros) in respect of non-pecuniary damage;

(ii) EUR 12,800 (twelve thousand eight hundred euros) in respect of costs and expenses, together with any value-added tax that may be chargeable;

(b) that simple interest at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 November 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Matti PELLONPÄÄ
President